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STATE OF MONTANA

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FILED

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 10-0101

CHARLES LOKEY,)
 and VANESSA LOKEY,)

Appellants,)

vs.)

ANDREW J. BREUNER,)
 and A.M. WELLES, INC.,)

Appellees.)

**APPELLANTS' MOTION
 TO RECONSIDER DECISION
 RE: ISSUES ON APPEAL**

COME NOW appellants Charles and Vanessa Lokey, pursuant to Rule 16, M.R.App.P., and move this Court to reconsider its decision regarding the issues it will review on appeal, copy attached as Appendix 1, on the grounds and for the reasons set forth below.

Opposing counsel have been advised of this motion, and object.

**APPELLANTS' MOTION TO RECONSIDER
 DECISION RE: ISSUES ON APPEAL**

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INTRODUCTION

This is a personal injury action arising out of an accident that occurred when a truck driver hauling gravel for A.M. Welles, Inc., overtook and began to pass Charles Lokey, who was riding a bicycle on South 19th Avenue in Bozeman, and then stopped and gestured for an oncoming motorist, Andrew Breuner, who was waiting to make a left turn, to proceed, whereupon Breuner, relying on that gesture, turned in front of Lokey, who was unable to stop and suffered serious injuries. *Amended Complaint* (Doc. 26),¹ at ¶¶ 2-7.

Lokey and his wife sued Breuner and Welles to recover compensation for his injuries and her loss of consortium, alleging:

The Lokeys' injuries and damages were caused by defendants' negligence, including but not limited to . . . the Welles truck driver's negligence in gesturing for Breuner to turn when he knew or should have known Charles Lokey was riding alongside his truck and trailer, and Breuner's negligence in making the turn and his failure to yield the right-of-way to Lokey.

Id., at ¶ 8.

The District Court dismissed Welles, stating:

While it is undoubtedly true that Welles knew Lokey was on a bicycle traveling on the shoulder of the road and had even passed him, Welles was no more responsible for Lokey than he was for any of the other hundreds of drivers on the road. All persons are required to use ordinary care to prevent others from being injured as a result

¹ The abbreviation "Doc." refers to the docket number in the District Court's Case Register Report.

of their conduct, but there is no statute or case law in Montana which requires more of Welles given the facts of this case. There simply is no authority for Lokey's proposition that a driver who courteously yields his right-of-way to a left-turning driver is responsible for determining if all other lanes of traffic are clear of pedestrians or bicycles or whatever may be there. . . .

Order Granting Motion to Dismiss (Doc. 40), at 4.

Although the Lokeys never argued that "a driver who courteously yields his right-of-way to a left-turning driver is responsible for determining if all other lanes of traffic are clear," but only that one who undertakes to direct traffic has a duty to exercise reasonable care,² that distinction was lost on the District Court, which dismissed one of two defendants who contributed to cause the accident.

In addition, the District Court suggested that Lokey was negligent:

... Lokey ... never addressed the fact that he met none of the conditions under which he would be allowed to pass a vehicle on the right pursuant to § 61-8-324, M.C.A. ...

Id., at 4-5.

Encouraged by that gratuitous remark, Breuner filed a motion for summary judgment, arguing that Lokey was negligent as a matter of law because he violated § 61-8-324, MCA, which prohibits overtaking and passing on the right. *Defendant's Motion for Summary Judgment* (Doc. 43). Although the District Court found that there are genuine issues of material fact precluding summary

² See *Plaintiffs' Response to Welles' Motion to Dismiss* (Doc. 36), at 9-15.

judgment, and denied Breuner's motion, it stated:

It is true that Lokey violated § 61-8-324, M.C.A. and was cited for that violation. . . .

Order Denying Summary Judgment (Doc. 62), at 2.

Thus, in addition to dismissing one of two defendants who contributed to cause the accident, the Court entered a finding of fact and conclusion of law – now the law of the case – that invades the province of the jury, is clearly erroneous, and will prevent adjudication on the merits.

The District Court certified Welles' dismissal as final for purposes of appeal, and the Lokeys filed a timely notice of appeal. They also appealed the District Court's gratuitous assertion that Lokey violated § 61-8-324, MCA. However, this Court recently indicated that it will not review the second issue. See Appendix 1.

STATEMENT OF THE PROBLEM

Regardless of how this Court rules on the first issue, it will remand this case for further proceedings, and the District Court's gratuitous assertion that Lokey violated § 61-8-324, MCA, will have a significant impact on those proceedings. It will affect the course of discovery and the evidence admitted at trial, settlement will be rendered more difficult, and the value of any verdict will be questionable, in all likelihood requiring another appeal and a second trial.

ARGUMENT

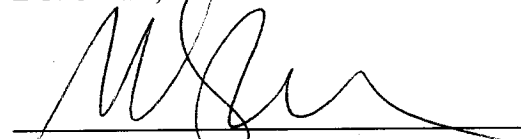
The District Court is proceeding under a mistake of law, and causing a gross injustice. Although its gratuitous assertion that Lokey violated § 61-8-324, MCA, may not be appealable pursuant to Rule 6(1) and (3), M.R.App.P., it suggested that Lokey was negligent when it granted Welles' motion to dismiss, its subsequent assertion relates back to its original analysis of the parties' respective duties, and that assertion – now the law of the case – would support a petition for supervisory control pursuant to Rule 14(3), M.R.App.P. Since this Court is going to address Welles' dismissal, there is no reason, aside from a rule this Court adopted and is free to interpret or modify to secure the just, speedy and inexpensive resolution of cases, to make the Lokeys await the outcome of this appeal and then file a petition for supervisory control. That would only delay and increase the cost, to the parties and the taxpayers, of resolving this case. Appellate review of the District Court's gratuitous assertion that Lokey violated § 61-8-324, MCA, at this juncture will prevent unnecessary and wasteful litigation, and facilitate the just, speedy and inexpensive resolution of this case.

CONCLUSION

For all of the reasons set forth above, this Court should reconsider its decision regarding the issues it will review on appeal, and address the District Court's gratuitous assertion that Lokey violated § 61-8-324, MCA.

DATED this 3 day of June, 2010.

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CERTIFICATE OF COMPLIANCE

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DATED this 3 day of June, 2010.



Martin R. Studer

CERTIFICATE OF SERVICE

I hereby certify that copies of this document have been served on the following by depositing the same, postage paid and addressed as follows, in the mail this 3 day of June, 2010.

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